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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD EDWARD GOMEZ,

Defendant and Appellant.

E052988

(Super.Ct.No. RIF10000864)

OPINION

APPEAL from the Superior Court of Riverside County. Gary B. Tranbarger,
Judge. Affirmed.

Andrea S. Bitar, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and Christopher
P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Richard Edward Gomez, left a party with two young women, driving

the car of one of the young women, after drinking until approximately 7:00 a.m. While driving, he went off the road and struck two power poles at a high rate of speed, causing the car to flip and land upside down in the road. One of the passengers was thrown 50 feet from the vehicle and suffered serious injuries, while the other suffered minor injuries. Defendant himself lost three fingers in the accident. Following a jury trial, defendant was convicted of felony drunk driving. (Veh. Code, § 23153, subds. (a), (b).) The jury also made true findings on separate allegations that defendant caused bodily injury to more than one victim (Veh. Code, § 23558), and that defendant's blood alcohol was .15 percent or more. (Veh. Code, § 23578.) He was placed on formal probation and appealed.

On appeal, defendant argues: (1) the trial court erroneously denied his motion for acquittal (Pen. Code, § 1118.1); (2) the court was required to instruct the jury, sua sponte, that it must unanimously agree on the specific legal duty defendant breached to satisfy the elements of Vehicle Code section 23153; and, in the alternative, (3) defense counsel rendered ineffective assistance of counsel in failing to request a unanimity instruction. We affirm.

BACKGROUND

On April 25, 2009, Denise D. and Brandy E. were at a hookah bar where they saw the defendant. Defendant had a few beers while there. At 1:00 or 2:00 a.m., when the hookah bar closed, Brandy and Denise went to a party at a residence in Perris, where they saw defendant again. At the party, everyone was drinking beer. Defendant had between

five and seven beers. Both Denise and Brandy were intoxicated. Denise wanted to leave, but Brandy was not ready to go, so Denise left the party to sleep in the back seat of the vehicle Brandy had been driving.

At approximately 7:00 a.m. the morning of April 26, 2009, after the beer ran out, Brandy and defendant left the party and got into Brandy's vehicle. Denise awoke briefly as Brandy entered the driver's side and defendant sat in the front passenger seat. Denise went back to sleep, awakened again when the car stopped at a gas station with an AM/PM store where Brandy pumped gas into the car and bought cigarettes. Before they left, defendant suggested that he drive because Brandy looked tired, and the two traded seats.

Defendant pulled the car out of the parking lot onto the wrong side of Cajalco Road, facing oncoming traffic, and quickly swerved back. Denise asked defendant if he was okay to drive and defendant said he was. Denise then drifted back to sleep, as did Brandy, after the latter fastened her seatbelt. The next time Denise awoke was when the car was flipping, which, because she was not wearing a seatbelt, caused her to be tossed around inside the car and ejected from it. Denise landed in the street approximately 50 feet from where the car came to rest.

Brandy also awoke when she became aware the vehicle was rolling. When the car stopped moving, defendant approached her side of the car and directed her to run; his hand was bloody from losing some fingers in the accident. Brandy exited the car through

the passenger side window because the car was upside down, and she started running because she was afraid the car would explode.

The California Highway Patrol responded to the scene of the accident and later investigated it. The evidence at the accident scene revealed the vehicle had been traveling westbound at a relatively high rate of speed, it drifted to the right, collided with one electrical power pole, then hit a second pole, causing it to overturn. Although the speed limit approaching the curve was 50 miles per hour, a sign warns drivers to reduce speed to 40 miles per hour at the curve. The car landed approximately 300 feet from the point of impact. The first pole was severed at the base but was still somewhat upright, but the second pole was knocked completely down. The asphalt was gouged due to contact with the right front wheel at a point between the two poles, indicating that the vehicle was tilting or overturning at that point.

All three occupants denied driving the vehicle, although Denise informed the investigating officer that defendant was driving at the time of the accident and that she felt he was intoxicated. Corroborating her statement, there were blood spatters on the driver's side of the vehicle's interior. Because it was known that defendant had injuries involving the severance of fingers on his left hand, it was not likely he was sitting in the front passenger seat.

At the hospital, the investigating officer detected the smell of alcohol on defendant's breath and observed objective symptoms of intoxication. The officer conducted a breath test using a preliminary alcohol screening (PAS) device at 9:48 a.m.

The results of the PAS test showed a blood alcohol level of .16 percent. Subsequently, a blood sample was taken from defendant. Forensic testing of defendant's blood showed a blood alcohol level at the time of the draw of .16 percent.

Denise was hospitalized for five weeks, having suffered a significant compression fracture of lower spine as well as a fractured breastbone, and sprains to both hands.

Brandy suffered minor injuries, including bruises, scrapes, and seatbelt burn.

On June 29, 2010, defendant was charged with two felony counts: driving under the influence of alcohol causing bodily injury (Veh. Code, § 23153, subd. (a), count 1), and driving with a blood alcohol level of .08 or more, causing bodily injury. (Veh. Code, § 23153, subd. (b), count 2.) As to each count, it was further alleged that defendant caused bodily injury to more than one victim (Veh. Code, § 23558), and that his blood alcohol concentration was .15 percent or more. (Veh. Code, § 23578.)

Defendant was tried by a jury which found him guilty of both counts and found all special allegations to be true on January 21, 2011. Defendant was placed on formal probation for four years on condition he serve one year in county jail, among other probation terms. On February 22, 2011, defendant timely appealed.

DISCUSSION

1. The Trial Court Properly Denied the Motion for Acquittal.

Defendant argues that the trial court erroneously denied his motion for acquittal at the close of the People's case because the People failed to produce specific evidence

supporting the element that defendant neglected a duty imposed by law, above and beyond his intoxication, which was the proximate cause of the accident. We disagree.

Penal Code section 1118.1 provides: “In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal. If such a motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without first having reserved that right.”

On a motion for judgment of acquittal under Penal Code section 1118.1, the trial court applies the same standard as an appellate court reviewing the sufficiency of the evidence. (*People v. Stevens* (2007) 41 Cal.4th 182, 200.) The court must consider whether there is any substantial evidence of the existence of each element of the offense charged, sufficient for a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. (*People v. Harris* (2008) 43 Cal.4th 1269, 1286, citing *People v. Cole* (2004) 33 Cal.4th 1158, 1212-1213.)

The question is simply whether the prosecution has presented sufficient evidence to present the matter to the jury for its determination. (*People v. Stevens, supra*, 41 Cal.4th at p. 200.) Where the motion is brought at the close of the People’s case, we review the denial of the motion based on the evidence as it stood at that time. (*Ibid.*;

People v. Ringo (2005) 134 Cal.App.4th 870, 880.) We independently review the trial court's ruling. (*People v. Cole, supra*, 33 Cal.4th at p. 1213.)

Three elements have been identified as essential to establish a violation of Vehicle Code section 23153: (1) that the defendant drove a vehicle while under the influence of an alcoholic beverage (subd. (a)) *or* while having 0.08 percent or more, by weight, of alcohol in his or her blood (subd. (b)); (2) that when so driving, the defendant did some act which violated the law or failed to perform some duty required by law; and (3) that as a proximate result of such violation of law or failure to perform such duty, another person was injured. (See *People v. Weems* (1997) 54 Cal.App.4th 854, 858.) To satisfy the second element, the evidence must show an unlawful act or neglect of duty *in addition to* driving under the influence. (*Ibid.* [italics by court].) The unlawful act or omission need not relate to any specific section of the Vehicle Code, but instead may be satisfied by the defendant's ordinary negligence. (*Ibid.*, citing *People v. Oyaas* (1985) 173 Cal.App.3d 663, 669.)

The general duty of the driver of a motor vehicle includes the duty to exercise ordinary care at all times to avoid placing himself or others in danger; to use like care to avoid an accident; and, to maintain proper control of his vehicle. (*People v. Oyaas, supra*, 173 Cal.App.3d at p. 669.) In *Oyaas*, the negligent act which was held sufficient to justify the conviction was the defendant's act of driving the vehicle erratically, swerving it from side to side, in neglect of the duty to exercise ordinary care at all times and to maintain proper control of his or vehicle. (*Id.* at p. 670.)

Contrary to defendant's argument, there was substantial evidence of the negligent act element where it was undisputed that defendant failed to maintain proper control of the vehicle. The physical evidence at the scene of the accident demonstrated defendant drove too fast on the turn in violation of his duty to exercise care by driving at a speed safe for the road conditions and he ran off the roadway, colliding with the two power poles, in violation of his duty to exercise care in maintaining proper control of the vehicle. Each of these acts constituted a failure to perform some duty required by law, or negligence.

The same evidence that demonstrated that the defendant's failure to perform a duty required by law also showed that the breach of that duty proximately caused the injuries to the two victims. By traveling at an unsafe speed at the curve in the road, defendant veered to the right off the road whereas the road curved to the left. The lack of skid marks at the scene of the accident supports an inference that defendant either did not apply the brakes, or that the brakes were malfunctioning. By failing to brake, the vehicle collided with two power poles when it left the road surface.¹

Viewing the record of the People's case in chief, there was substantial evidence that defendant failed to perform some duty required by law, which negligent conduct,

¹ The defense attempted to establish that a mechanical problem with the brakes may have caused the accident. However, operating a car with defective brakes has been held to support a conviction either as a violation of the Vehicle Code or as proof of negligence. (See *People v. Campbell* (1958) 162 Cal.App.2d 776, 782.)

aside and apart from defendant's intoxication, satisfied both the element of breach of duty and the element of causation to support the conviction.

2. The Trial Court Was Not Required to Instruct, Sua Sponte, that the Jury Must Unanimously Agree on the Specific Legal Duty Violated.

Defendant argues the court had a sua sponte duty to instruct the jury that it must unanimously agree on the specific legal duty which proximately caused the accident. We disagree.

It is a fundamental principle of our criminal justice system that the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime with which he is charged. (Pen. Code, § 1096.) Additionally, the jury must agree unanimously that the defendant is guilty of a *specific* crime. (*People v. Bui* (2011) 192 Cal.App.4th 1002, 1010 [italics by court].) Where the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. (*Ibid.*, citing *People v. Russo* (2001) 25 Cal.4th 1124, 1132.) Where the defendant is charged with a single count, but the evidence shows he committed multiple crimes that could qualify for a conviction under that count, the unanimity instruction is required. (*Russo, supra*, at pp. 1134-1135.)

The requirement of unanimity typically applies to acts that could have been charged as separate offenses. (*People v. Maury* (2003) 30 Cal.4th 342, 423; *People v. Jenkins* (2000) 22 Cal.4th 900, 1025.) Stated another way, the unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and

yet convict him of the crime charged. (*Maury*, at p. 423.) Where the acts proved are just alternate ways of proving a necessary element of the same offense, and do not in themselves constitute separate chargeable offenses, the unanimity instruction need not be given. (*People v. Mitchell* (1986) 188 Cal.App.3d 216, 222.)

Further, there is no requirement that the jurors unanimously agree on the theory supporting the conviction. (*People v. Jenkins, supra*, 22 Cal.4th at pp. 1024-1025; *People v. Davis* (1992) 8 Cal.App.4th 28, 40-41.) The United States Supreme Court has explained that “different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.” (*Schad v. Arizona* (1991) 501 U.S. 624, 631-632 [111 S.Ct. 2491, 115 L.Ed.2d 555].) Thus, jurors need not agree on the theory of supporting a conviction for first degree murder (*People v. Chavez* (1951) 37 Cal.2d 656, 670-672), or the method of theft in a prosecution for larceny (*People v. Nor Woods* (1951) 37 Cal.2d 584, 586), or the felony underlying a charge of burglary (*People v. Failla* (1966) 64 Cal.2d 560, 567-569), or the acts which constitute the special circumstance of lying in wait. (*People v. Edwards* (1991) 54 Cal.3d 787, 824.)

In *People v. Mitchell, supra*, 188 Cal.App.3d 216, the defendant was convicted of felony drunk driving based on his acts of engaging in a speed contest and driving at an unsafe speed while intoxicated. Because the two speeding theories were simply alternate ways of proving an element of the same drunk driving charge, the unanimity instruction

was not required. Similarly, in *People v. Varela* (2011) 193 Cal.App.4th 1216, the reviewing court held that unanimity instructions were not required in a prosecution for fleeing or eluding a police officer (Veh. Code, § 2800.2), which requires proof that defendant committed three or more traffic violations or caused property damage during a pursuit. The court concluded that no unanimity instruction is required simply because the jury may not have agreed on the predicate violations. (*Id.* at p. 1220.)

The same is true here. The criminal offense of felony drunk driving was based on the theory that defendant failed to perform a duty required by law. This element was established by proving the defendant committed certain acts, which did not in themselves constitute separate chargeable offenses, but did constitute alternate ways of proving that defendant failed to perform a duty required by law.

Because the acts of driving at an unsafe speed, crossing the lane divider, and driving off the shoulder of the road striking a power pole are simply alternate ways of proving the defendant failed to perform a duty required by law (that is, to safely operate and control the vehicle), no unanimity instruction was required.

3. Defendant Received Effective Assistance of Counsel.

Defendant argues that in the event we should determine the court was under no duty to instruct sua sponte that the jury must agree on the specific legal duty, he asserts his trial counsel was ineffective in failing to request a unanimity instruction. We disagree.

As explained in section 2, no unanimity instruction was required or appropriate because the multiple acts did not constitute separately chargeable offenses. Because the instruction was inappropriate, defense counsel's failure to request a unanimity instruction cannot be deemed deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [104 S.Ct. 2052, 80 L.Ed.2d 674]; see also *People v. Castaneda* (2011) 51 Cal.4th 1292, 1350.) Where there is no basis on which to give an instruction, counsel's failure to request such an instruction cannot be deemed deficient performance.

Defendant's right to effective assistance of counsel was not violated.

DISPOSITION

The judgment is affirmed.

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RAMIREZ

P.J.

We concur:

RICHLI

J.

MILLER

J.